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No. 88-1901

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

v.

DELTA AIR LINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner respectfully submits this reply brief in support of its petition for certiorari.

1. Delta's brief in opposition argues that the court below properly applied this Court's decision in *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987) by relying on a public policy "ascertained by reference to the laws and legal precedents." Opp. at 7-8. But that is not the issue in this case. We have never challenged the existence of the public policy relied on by the court below—namely, the policy against flying while intoxicated. Nor have we ever denied that the conduct of the pilot in this case violated that policy. The question here, however, is whether the arbitrator's award—which determined that under all the circumstances discharge

was too severe a remedy—violated that or any other public policy.

Delta appears not even to understand that there is a crucial difference between the question whether the *pilot's conduct* violated public policy and the question whether the *arbitrator's award* violated public policy. This lack of understanding is illustrated by Delta's discussion of *Northwest Airlines, Inc. v. Air Line Pilots Association*, 808 F.2d 76 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1751 (1988). Delta characterizes that case as "the only decision indicating that operating an aircraft while intoxicated *is somehow consistent with public policy.*" Opp. at 8 (emphasis supplied). Obviously, that decision does not hold that flying while intoxicated is "consistent with public policy." Rather, the court merely found that no public policy problem was raised by a decision of an arbitrator reinstating a pilot who had been recertified by the FAA after treatment for alcoholism.

There is a basic difference, not only in result but in approach, between the Eleventh Circuit's decision in this case and the D.C. Circuit's decision in *Northwest Airlines*. This conflict permeates several other lower court decisions as well. For the reasons stated in the petition, we believe this conflict should be resolved by this Court.

2. Delta attempts to reconcile the conflict among the circuits by contending that the results reached in all of the cases are consistent with the rule articulated by the Eleventh Circuit in this case—that an arbitrator may not reinstate an employee whose misconduct violated a public policy that specifically related to the performance of his job duties. Opp. at 9. This formulation of the public policy doctrine, however, appears nowhere in any other decision. For example, in *United States Postal Service v. National Association of Letter Carriers*, 839 F.2d 146 (3d Cir. 1988), which Delta attempts to explain on this basis, the court assumed that there was a

public policy against the employee's work-related conduct (physical violence against a supervisor) but nevertheless determined that the policy was not violated by the award because the arbitrator found that the employee would not be aggressive in the future. On the other hand, in *Stead Motors v. Automotive Machinists Lodge, No. 1173*, 843 F.2d 357 (9th Cir.), *reh'g granted*, 857 F.2d 686 (1988), the Ninth Circuit invalidated an award even though there was no public policy regulating an employee's failure to tighten lugbolts on an automobile. Delta's theory simply does not explain the divergent results in these and other cases.

As we previously noted, the Eleventh Circuit's employment-related standard, if strictly applied, would invalidate arbitral awards any time an employee violates even the most petty work rule embodied in public policy, such as a parking violation by a truck or taxi driver. Pet. at 10. To avoid this result, Delta is forced to limit the rule by stating that "[o]nly in those rare instances where an employee has committed truly egregious acts in performing his job is public policy offended by a reinstatement order." Opp. at 10. This standard is no standard at all. It would permit every federal judge to determine what constitutes "truly egregious acts." Such a standard would eviscerate this Court's decisions restricting judicial review of labor arbitration awards.

3. Delta's argument that the "unique" regulatory and statutory framework of the Federal Aviation Act makes this case inappropriate for review by the Court is without merit. Opp. at 6-7. Contrary to Delta's protestation, there is nothing unique about the authority of labor arbitrators in the airline industry.[1] No court has ever held

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[1] The district court rejected Delta's argument on this issue. *See* App. 26a-28a. *See also Northwest Airlines*, 808 F.2d at 81 (Railway Labor Act arbitrations often implicate safety issues and no court has ruled that an arbitration board lacks jurisdiction over such issues).

that anything in the Federal Aviation Act gives the courts broader authority to review arbitration awards in the airline industry than in other industries.

In fact, the regulatory role of the FAA in pilot certification and air safety matters militates against, not in favor of, the decision below. Captain Day's fitness to fly was a matter within the jurisdiction of the FAA, not the federal courts. And once the FAA had recertified him, the issue of whether he was to be reinstated to his job at Delta was purely a matter of labor relations and collective bargaining, not a matter of public policy.[2]

4. Finally, Delta argues that the Eleventh Circuit's ruling that the arbitrator could not consider post-discharge evidence of Captain Day's alcoholism and rehabilitation is an "incidental issue in the case" not likely to affect other litigants, and therefore not worthy of consideration by this Court.[3] In fact, this is a recurring issue, for arbitrators frequently rely on post-discharge events in determining whether to reduce the penalty imposed. *See* Pet. at 12. The ruling that this is impermissible is clearly at odds both with *Misco* and the decisions of other circuits and is an independent ground for the Court's review.

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[2] In addition to the FAA's recertification of Day, its enforcement arm viewed his alcoholism and rehabilitation as mitigating when it levied a sanction for his violation of federal air regulations. Instead of issuing the usual sanction of revoking his license, the FAA issued a retroactive suspension because he was "diagnosed as an alcoholic shortly after this incident" and because of his "completion of a rehabilitation program."

[3] Delta's related argument that "[n]othing in the collective bargaining agreement . . . created any right to treatment for alcohol-related problems" is disingenuous. Opp. at 10. Although the alcohol program is not contained in the collective bargaining agreement, it was established by agreement between Delta and ALPA in a separate side letter. Accordingly, it clearly constitutes an "agreement concerning rates of pay, rules or working conditions" within the jurisdiction of the System Board. See 45 U.S.C. § 184.

CONCLUSION

For the reasons stated in the petition and in this reply brief, the writ of certiorari should be granted.

Respectfully submitted,

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